82-1867

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BEN KOZLOFF, INC.,
Defendant-Appellee-Petitioner,
vs.
WELLS FARGO BUSINESS CREDIT,
Plaintiff-Appellant-Respondent.

Appeal from the United States Court of Appeals for the Fifth Circuit

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fifth Circuit err in refusing to hold Respondent Wells Fargo Business Credit to a comparable standard of care upheld in the Court of Appeals for the Second Circuit regarding the imputing of knowledge and notice from corporate employees to a corporate principal?

2. Did the Court of Appeals for the Fifth Circuit err by applying a standard of review for sufficiency of evidence questions that so far departed from the accepted and usual course of judicial proceedings and standard of review for such matters as to require the power of supervision by the United States Supreme Court?

3. Did the Court of Appeals for the Fifth Circuit err by requiring that a party detrimentally rely on another party's conduct before such party's conduct may constitute acts of waiver to certain known rights; and, as such, did the Court of Appeals for the Fifth Circuit create important federal law which has not been settled by this court?*

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* The parties to the proceeding in the United States District Court and United States Court of Appeals for the Fifth Circuit were Wells Fargo Business Credit, as Plaintiff and Appellant, and Ben Kozloff, Inc., as Defendant and Appellee.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Ben Kozloff, Inc. filing this Petition for Certiorari as Petitioner in this proceeding, states that:

1. This is its original Designation of Corporate Relationships.

2. Farmhouse Foods, Inc. is the parent corporation of the Ben Kozloff, Inc.

3. The Pan Am Seafood, Ltd. and B & H Sales, Inc. are the subsidiaries of Ben Kozloff, Inc. Ben Kozloff, Inc. does not have an ownership interest in any other subsidiaries.

4. The only affiliates of Ben Kozloff, Inc. are: FARM HOUSE FOODS CORPORATION, A Wisconsin Corporation

HANCOCK NELSON MERCANTILE CO., Div. of Farm House Foods Corporation
MIDWAY SUGAR, Div. of Farm House Foods Corp.
FARM HOUSE WHOLESALE CORP. , A Wisconsin Corporation
MIDLAND GENERAL CORPORATION, A Wisconsin Corporation
ROBERTS FARM HOUSE FOODS CORP., A Wisconsin Corporation
CARPENTER COOK COMPANY, A Michigan Corporation
F. H. FINANCIAL CORPORATION, A Wisconsin Corporation
WHITE DRUG ENTERPRISES, INC., A North Dakota Corporation
BDFG, INC., A Wisconsin Corporation
SCOT LAD FOODS, INC., A Deleware Corporation
W & F MANUFACTURING CO , INC., A New York Corporation

MARKET BASKETS STORES, INC., A Wisconsin Corporation
F. H. FAN CO., INC., A Wisconsin Corporation
WISCONSIN CHEESE HOUSE, INC., A Wisconsin Corporation
P M MOTOR CORPORATION, A Delaware Corporation
BDFG, INC. DBA SANDUSKY FOODLAND, An Ohio Corporation
AMOTO, INC. DBA SHELBY FOODLAND, An Ohio Corporation
STINEWAY DRUG STORES, INC., A Wisconsin Corporation
STINEWAY WACKER, INC., A Wisconsin Corporation
FARM HOUSE WHOLESALE CORPORATION
PESHTIGO FOODS, INC., DBA PESHTIGO IGA, A Wisconsin Corporation
TRI-MART CORPORATION, A Wisconsin Corporation
WIGWAM FOODS, INC.
WAREHOUSE STORES, INC.
ROBERTS FARM HOUSE FOODS CORPORATION
ST. PAUL CASH & CARRY
ROBERTS CASH & CARRY
WAREHOUSE STORES
TRI-MART CORPORATION
TRI-MART CORPORATION - MENOMONIE DIVISION
ROUND-UP REALTY DBA BIG SAVER - GREEN BAY
ROUND-UP REALTY DBA BIG SAVER -MANITOWOC
BANKIT FINANCIAL CORPORATION, A Wisconsin Corporation

WHITE DRUG CO. OF WILLMAR, INC., A Minnesota Corporation
WHITE DRUG CO. OF ABERDEEN, INC. A South Dakota Corporation
W. D. SYSTEMS, INC., A North Dakota Corporation
WHITE DRUG CO. OF JAMESTOWN, INC., A North Dakota Corporation
WHITE DRUG CO. OF YANKTON, INC., A South Dakota Corporation
WHITE'S INC. OF MONTANA, A Montana Corporation
LAKE END SALES, INC., An Indiana Corporation
GARDEN CITY FOODS, INC., An Indiana Corporation
PANGLES MASTER MARKETS, INC., An Ohio Corporation
REDI—FROZ, INC., An Indiana Corporation
G. F. BRIDGEPORT, INC., A West Virginia Corporation
G. F. GRAFTON, INC., A West Virginia Corporation
G. F. HARRISVILLE, INC., A West Virginia Corporation
G. F. MANNINGTON, INC., A West Virginia Corporation
G. F. LEWIS EAST, INC., A West Virginia Corporation
EAST MAIN, INC., An Ohio Corporation
MICHIGAN-SIDNEY, INC., An Ohio Corporation
CAL-DUNES HWY., INC., An Indiana Corporation
CAL-LAKE STATION, INC., An Indiana Corporation
CAL-HAMMOND, INC., An Indiana Corporation
CAL-GRIFFITH, INC., An Indiana Corporation

ERVIN, INC., An Ohio Corporation
ELIDA, INC., An Ohio Corporation
ILLINOIS GROCERY PUBLIC STORAGE, An Illinois Corporation
BONNIE BAKING CO. INC., An Indiana Corporation
BEECHMONT FOODS, INC., An Ohio Corporation
COUPON CENTER, INC., An Ohio Corporation
BEST VALUE FOODS, INC., An Illinois Corporation
ROLLING MEADOWS NO. 1, INC., An Illinois Corporation
ST. CHARLES NO. 1, INC., An Illinois Corporation
EAST DUNDEE NO. 1, INC., An Illinois Corporation
CHICAGO HEIGHTS NO. 1, INC., An Illinois Corporation
CENTRAL CIRCLE, INC., An Ohio Corporation
LARKIN FOODS, INC., An Illinois Corporation
FIRST COMMERCIAL CORPORATION, A West Virginia Corporation
T-MART OF MISSOURI, INC., A Missouri Corporation
CUSTOM MERCHANDISERS, INC., An Illinois Corporation
MARKET PLACE SUPERMARKET, INC., An Ohio Corporation
G. F. EDGEWOOD, INC., A West Virginia Corporation
G. F. ELKINS, INC., A West Virginia Corporation
G. F. SHINNSTON, INC., A West Virginia Corporation
G. F. WESTON, INC., A West Virginia Corporation
G. F. WEST MILFORD, INC., A West Virginia Corporation

NORRIS DRIVE FOODS, INC., An Illinois Corporation
COLLEGE-HILL BUCKEYE, INC., An Ohio Corporation
EAST HARDING, INC., An Ohio Corporation
WEST NORTHERN, INC., An Ohio Corporation
TROY-BUCKEYE, INC., An Ohio Corporation
WEST-ELM, INC., An Ohio Corporation
CAL-HOBART, INC., An Indiana Corporation
CAL-GRANT STREET, INC., An Indiana Corporation
CAL-CROWN POINT, INC., An Indiana Corporation
REDI-WRIGHT, INC., An Indiana Corporation
KANKAKEE WEST SUPERMARKET, INC., An Illinois Corporation
KANKAKEE SOUTH SUPERMARKET, INC., An Illinois Corporation
BRADLEY SUPERMARKET, INC., An Illinois Corporation
MISTER INDUSTRIES, INC., An Illinois Corporation
SCOT FARMS FOOD, INC., An Indiana Corporation
SCOT FARMS PACKING, INC., An Indiana Corporation
CAL-MAIN FOODS, INC., An Indiana Corporation
SHOPPERS CHOICE SUPERMARKETS, INC., A Kentucky Corporation
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Dated: May 6, 1983

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Defendant-Appellee-Petitioner,
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WELLS FARGO BUSINESS CREDIT,
Plaintiff-Appellant-Respondent.

Appeal from the United States Court of Appeals for the Fifth Circuit

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PETITION FOR CERTIORARI

Your Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on January 20, 1983, and the Petition for Rehearing denied on February 18, 1983 and Suggestion for Rehearing En Banc denied on the same date.

OPINIONS BELOW

The District Court for the Northern District of Texas, Dallas Division, Judge Patrick E. Higginbotham, did not write an opinion; however, judgment in favor of Defendant-Appellee Ben Kozloff, Inc. was signed on May 28, 1981, a copy of which is appended to this Petition as Exhibit "A" in the Appendix. The opinion of the Court of Appeals for the Fifth Circuit is reported at 695 F.2d 940 (5th Cir. 1983), and also is appended hereto as Exhibit "B" in the Appendix.

JURISDICTION

The Court of Appeals for the Fifth Circuit rendered judgment for Appellant by reversing and rendering on January 20, 1983, and said Court of Appeals denied Appellee's Petition for Rehearing on February 18, 1983. Copies of the judgment and order denying rehearing are appended to this Petition as Exhibits "C" and "D", respectively. The jursidiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent, Wells Fargo Business Credit, is a corporation duly incorporated and existing under the laws of the State of California and authorized to do business in Texas, with its principal place of business at 4100 McEwen Road, Suite 200, Dallas, Texas 75234. (R. 257). Additionally, Respondent has a home office which is located in Dallas, Texas at 12700 Park Central Drive. (TR. 288). Petitioner, Ben Kozloff, Inc., is a corporation duly incorporated and existing under the laws of the State of Illinois, with its principal place of business in the State of Illinois at 35 East Wacker, Chicago, Illinois 60601. (R. 257). Respondent is a commercial lending institution. (R. 257). Petitioner and Williamson Companies, Inc. are frozen seafood brokers and/or wholesalers, and at all times relevant Williamson Companies, Inc. was a corporation duly incorporated and existing under the laws of the State of Texas, with its principal place of business at 4119 Billy Mitchell Drive, Addison, Dallas County, Texas 75001. (R. 257). At all times relevant hereto, Petitioner from time to time sold to and purchased from Williamson Companies, Inc. shipments of frozen seafood. (R. 257).

Ben Kozloff is the president of Ben Kozloff, Inc. (TR. 226). Greg Williamson was vice president and secretary of Willaimson Companies, Inc. (TR. 179).

David Knight is regional credit and operations manager for Respondent, and Bob Gary Copeland is senior vice president for Respondent. (TR. 71 and 284). Tom Eck, Harold Combs, Don Hardy, Gerald Burgess and Randy Pool are all employees of Respondent. (TR. 223, 121, 122-124 and 181). All the foregoing employees of Respondent were, at some point in time applicable herein, in charge of receiving the books, records and accounts of Williamson

Companies, Inc. This point is important because it pertains to Questions 1 and 2 concerning the knowledge of Respondent of the hereinafter referred June offset of accounts between Petitioner and Williamson Companies, Inc.

On or about May 8, 1979, Petitioner executed a letter agreement directed to Respondent (Plaintiff's Exhibit 1) and delivered same to Greg Williamson of Williamson Companies, Inc., such letter agreement being addressed to Respondent at Dallas, Texas. The no offset agreement (Plaintiff's Exhibit 1) and the form of the language were required by Respondent before it would advance monies to Williamson Companies, Inc., using such accounts as a basis for the loans. (TR. 90, 137-139 and 183-185). On or about May 11, 1979, Williamson Companies, Inc. made, executed and delivered to Respondent an accounts loan agreement (Plaintiff's Exhibit 2). (R. 257). On or about May 25, 1979, Petitioner rescinded the May 8, 1979, letter agreement by executing a letter (Defendant's Exhibit 2) directed to Respondent in Dallas, Texas and mailed to Greg Williamson of Williamson Companies, Inc. (TR. 232-233). On or about May 31, 1979, Greg Williamson confirmed verbally and by telex (Defendant's Exhibit 3) the authorization by Williamson Companies, Inc. to offset their accounts in the amount of $113,750.00 (TR. 193). On or abut June 13, 1979, Petitioner tendered a check and voucher (Defendant's Exhibits 8 and 9) to Williasmon Companies, Inc. with notations on the voucher and the back of the check that said payment was in full payment of certain numbered invoices (the June offset). (TR. 197). Greg Williamson endorsed the check for Williamson Companies, Inc. and remitted the check and voucher (Defendant's Exhibits 8 and 9) to Respondent where it was processed. (TR. 197). Greg Williamson remitted the foregoing check and voucher by attaching same to a daily collateral report which Williamson Companies, Inc. forwarded to Respondent. (TR. 197). The daily collateral report was part of a process structured and

required by Respondent wherein all checks and invoices were forwarded to Respondent. (TR. 75-79). Respondent maintained complete files regarding all invoices and checks received by Williamson Companies, Inc. during the loan period involved herein. (TR. 75-79). David Knight, Tom Eck and Randy Pool, all employees of Respondent, instructed Greg Williamson and Williamson Companies, Inc. regarding the reporting procedures required by Respondent during the period involved herein. (TR. 121-122 and 181). Harold Combs, Don Hardy and Gerald Burgess, all employees of Respondent, each at some point in time had the day to day responsibility to review the collateral reports which were received from Williamson Companies, Inc. (TR. 122-124). Additionally, the foregoing employees of Respondent had the monthly responsibility to review the accounts receivables, accounts payables, aging, etc. (TR. 124-125). At all times between May 8, 1979, and January 9, 1980, Petitioner never had any direct communciation with Respondent other than through Greg Williamson. (TR. 240).

No further offsets of these accounts occurred until December 28, 1979, when Petitioner offset the sum of $285,597.40 of amounts owing to Williamson Companies Inc., said amounts are represented by certain Williamson Companies, Inc. invoices (Plaintiff's Exhibits 5, 6, 7, 8, 9, 19 and 11). (TR. 218, R. 258). On or about December 28, 1979, Greg Williamson received for Williamson Companies, Inc. two checks and vouchers representing the payment in full of certain numbered invoices after offsetting the foregoing $285,597.40. (Defendant's Exhibits 4, 5, 6 and 7). Subsequently, Greg Williamson gave these checks and vouchers (Defendant's Exhibits 4, 5, 6 and 7) to Randy Pool, and Randy Pool (Respondent's employee) instructed Greg Williamson not to worry about the offset and to endorse and process. (TR. 219-220).

On January 9, 1980, Respondent made demand upon Petitioner for payment of the $285,597.40. (Plaintiff's

Exhibit 3). This diversity suit was instituted by the filing of Plaintiff's Original Complaint (R.1) in the District Court for the Northern District of Texas on January 24, 1980.

A jury trial was held on April 30 through May 1, 1981. Respondent's (Plaintiff's) Motion for Directed Verdict (R. 267) made at the close of evidence was denied. Three special issues were submitted to the jury concerning (1) receipt by Greg Williamson of the May 25, 1979, rescission letter, (2) agency relationship between Greg Williamson and Respondent and (3) waiver by Wells Fargo Business Credit of its contractual rights specified in the May 8, 1979, no offset agreement. (R. 264, 275 and 276). The jury found all issues in favor of the Petitioner (Defendant). Upon motion by the Petitioner (Defendant) (R. 278), Judgment on the verdict was entered May 28, 1981. (R. 280). Respondent's (Plaintiff's) Motion for Judgment Notwithstanding the Verdict, and Alternative Motion for New Trial were filed on June 8, 1981 (R. 282) and were denied by Order of the Court dated August 17, 1981. (R. 292). Notice of Appeal from the Judgment of the District Court was filed on September 16, 1981. (R. 293).

EXISTENCE OF JURISDICTION BELOW

The District Court for the Northern District of Texas had jurisdiction over this diversity matter under 28 U.S.C. § 1332.

ARGUMENT

QUESTION NO. 1 (RESTATED). DID THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN REFUSING TO HOLD RESPONDENT WELLS FARGO BUSINESS CREDIT TO A COMPARABLE STANDARD OF CARE UPHELD IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT REGARDING THE IMPUTING OF KNOWLEDGE AND NOTICE FROM CORPORATE EMPLOYEES TO A CORPORATE PRINCIPAL?

We first turn to the Court of Appeals' decision regarding the standard of care concerning knowledge of facts from which failure to act may constitute waiver. As previously shown in the foregoing Statement, Petitioner rescinded the original May 8, 1979, no offset agreement (Plaintiff's Exhibit 1) by sending the May 25, 1979, rescission letter (Plaintiff's Exhibit 2). (R.257). Both letters were directed to Respondent by delivery or mailing to Greg Williamson. Immediately following the May 25, 1979, letter, and in early June, 1979, Petitioner and Greg Williamson of Williamson Companies, Inc. offset the sum of $113,750.00 which would have been in direct conflict with the rights of Respondent under the May 8, 1979, no offset agreement. As discussed in *Wells Fargo Business Credit v. Kozloff,* 695 F.2d 940 at 947, Petitioner paid the foregoing June offset of $113,750.00 by transmitting a check and voucher which showed the offset, and said check and voucher were forwarded to Respondent for processing through Williamson Companies, Inc. The Court of Appeals held that, even though the Respondent had the facts before it regarding the foregoing June offset, such facts were only transmitted through the ordinary course of Respondent's business; and, therefore, the Court of Appeals refused to hold Respondent to such a high degree of care since it did not have direct knowledge of the subject June offset. The Fifth Circuit reasoned that, since Respondent did not have direct knowledge of the June offset, it could not intentionally waive its right under the May 8, 1979, no offset agreement, as found by the jury.

The Fifth Circuit's decision and holding squarely conflicts with the holding in *Corporation De Mercado Agricola v. Mellon Bank International,* 608 F.2d 43 (2d Cir. 1979) wherein the court applied a much different standard of care regarding the imputing of notice and knowledge of corporate employees to a corporate party and the requirement of direct knowledge. This Petitioner submits that it is not seeking to hold Respondent to an extreme and un-

reasonable standard of care in light of *Mellon*; to the contrary, the Court of Appeals for the Fifth Circuit is holding this Petitioner to an extreme and unreasonable burden by requiring that it ascertain the in-house procedures of Respondent in order to give to Respondent direct knowledge of rescission of the subject contract.

Unquestionably, the Second Circuit in *Mellon* applied a much different standard of care. In *Mellon* the plaintiff (CMA) sought the enforcement of a letter of credit drawn against the defendant (Mellon Bank). At issue, inter alia, was whether plantiff had notice of a revocation letter mailed to it and received by it. Plaintiff argued that the sender of the revocation letter should have sent the letter to its legal department or its president's office *where its importance would have been recognized*. The court rejected completely plaintiff's argument. The letter was received *in the normal course of business* by plaintiff's mailroom and placed in a general correspondence file. The court correctly held plaintiff had notice of the revocation letter albeit it did not have direct knowledge. The court stated the longstanding principle that notice to the agent is imputed to the principal, unless the person giving notice has reason to know that the agent has no duty to or will not transmit the message to the principal. The court further held that since the plaintiff failed to show that the sender should have known that plaintiff's mailroom would not transmit the letter to the proper persons, then notice of the letter was imputed to plaintiff.

The facts in Mellon are identical to this case. The Court of Appeals for the Fifth Circuit failed to apply the longstanding agency rule of imputing notice to the agent as notice to the principal, i.e., notice to Respondent's collateral processor, loan supervisor and accountants (all Respondent's employees) as notice to Respondent. As the Fifth Circuit points out, it is undisputed the material facts concerning the June offsets were indeed received by a collateral processor, reviewed by loan supervisors and

scrutinized by auditors and accountants in the 90 day audits. (695 F.2d 940 at 948). However, the Court of Appeals does not impute this knowledge or notice of the June offsets to the Respondent because the subject check and voucher were processed through the *ordinary course of business.*

The Fifth Circuit reasoned that it was not the collateral processor's duty to inspect the checks and vouchers for offsets; therefore, notwithstanding notice of the June offsets to Respondent's employees, it was extreme and unreasonable to impute this knowledge or notice to Respondent. However, the court in *Mellon* had little difficulty imputing notice of the revocation letter to the plaintiff, even though plaintiff was a large corporation engaged in the business of selling Venezuelan agricultural commodities worldwide, and undoubtedly it received large amounts of correspondence daily. *The holding here should be the same as in Mellon.* Respondent received notice of the June offset in its normal course of business exactly like the plaintiff in *Mellon* received the revocation letter in its normal course of business.

A critical distinction between the Fifth Circuit's decision and the *Mellon* decision is that in *Mellon* the court placed a burden on the plaintiff to show that the sender should have known plaintiff's mailroom would not transmit the letter to the proper persons. Since the plaintiff in that case did not make this showing, the notice of the revocation letter was imputed to the plaintiff. The Fifth Circuit here, however, has put the burden on Petitioner to show that the notice of the June offsets to Respondent would be transmitted to the proper persons. The Court of Appeals put this burden on the wrong party. Petitioner supplied the material facts concerning the June offsets to Respondent, *which Respondent does not deny receiving.* By requiring Petitioner to show that the material facts concerning the June offsets would be transmitted to the proper persons, who would have recognized its importance, the Fifth Circuit has

incorrectly placed an insurmountable standard of care and burden on Petitioner which is in *direct conflict* with the holding by the Second Circuit in *Mellon*.

Petitioner respectfully submits that the Supreme Court of the United States should not permit this departure from *Mellon*. The practical impact of the Fifth Circuit's decision leaves the Petitioner, a Chicago, Illinois resident, and all others similarly situated, with the problem of when dealing in interstate commerce, such as in this case, how much burden does one have regarding notice to a corporation or principal located in New York or Texas. As it stands now, the burdens greatly differ when dealing in New York as opposed to Texas.

Further, Petitioner respectfully requests this Honorable Court not to allow the decision to stand which requires those situated as Petitioner to fully investigate the in-house procedures of one receiving a notice, if the party receiving the notice is located in Texas. Additionally, Petitioner respectfully requests this Honorable Court not to allow the decision to stand which allows those situated, as Respondent, in Texas to hide behind their own *inadequate, in-house procedures*.

QUESTION NO. 2 (RESTATED). DID THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR BY APPLYING A STANDARD OF REVIEW FOR SUFFICIENCY OF EVIDENCE QUESTIONS THAT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND STANDARD OF REVIEW FOR SUCH MATTERS AS TO REQUIRE THE POWER OF SUPERVISION BY THE UNITED STATES SUPREME COURT?

Petitioner turns now to the question concerning the waiver of Respondent's contractual rights in the May 8, 1979, no offset letter agreement and the Fifth Circuit's determination that a judgement n.o.v. should have been granted by the trial court regarding this issue. *Wells Fargo*

v. Kozloff, supra, at 947. The standard of review for the Court of Appeals for determining whether the trial court should have granted a motion for judgement notwithstanding the verdict is that *all* the evidence be reviewed in the light most favorable to the opponent of the motion (Petitioner herein) and, if the reviewing court finds that the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the motion for a judgment notwithstanding the verdict should be granted. *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Bazile v. Bisso Marine Co., Inc.*, 606 F.2d 101 (5th Cir. 1979); *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969). The reviewing court of appeals cannot weigh the evidence when confronted with a motion notwithstanding the verdict since it is the duty of the jury to determine conflicts of evidence by considering which witnesses and evidence are more credible. *Brady v. Southern Ry Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943); *Boeing v. Shipman*, supra, at 375; *Bazile v. Bisso*, supra, at 105; and *Jones v. Tarrant Utility Company*, 638 S.W.2d 862 at 866 (Tex. Sup. 1982). The jury may draw all reasonable inferences and deductions from the evidence, and it may weigh all the evidence. *Boeing v. Shipman*, Supra, at 375. Further, when a court reviews the record for abuse of discretion for denying a motion for new trial, as in this case, the reviewing court of appeals may weigh the evidence for determination of an abuse of discretion, and in the event of an abuse, the reviewing court must grant a new trail. *Bazile v. Bisso*, supra.

In reviewing the record of this cause, the honorable Court of Appeals for the Fifth Circuit determined that the evidence established that information was within Respondent's possession to give it notice of the June offsets. *Wells Fargo v. Kozloff*, supra, at 948. The Fifth Circuit set out in its opinion on page 948 the following:

Wells Fargo does not deny that it received the check

and voucher. It does contend however, that it had no direct knowledge that Kozloff had offset the Williamson account at any time prior to the offset of December 28, 1979 which triggered this lawsuit. It bases this argument on the fact that the check from Kozloff was processed in Wells Fargo's ordinary course of business, which does not include procedures to apply payments to specific invoices.

The Fifth Circuit, in its opinion on page 948, further states that, even though this evidence is in the possession of Respondent, it will not hold Respondent to such an extreme standard of care regarding the direct knowledge of the June offsets.

The Fifth Circuit weighed the evidence and supplanted the role of the jury since the jury obviously determined that the check and voucher were sufficient notice to Respondent of the June offset. The Fifth Circuit discussed at length the in-house procedures of Respondent for processing checks such as the relevant check and voucher, and then said court determined that Respondent would not have been able to ascertain the offset under these circumstances. The court, while taking into consideration that the check and voucher, which in and by itself would be sufficient evidence as to the June offsets, were before Respondent and within its possession, held that a judgment n.o.v. should have been granted. Additionally, the evidence showed that Respondent's accountants conducted audits of Williamson's company records which would have certainly turned up these June offsets, since there was no evidence that Williamson Companies, Inc. falsified any of its records.

As shown by the record in this cause and admitted by the Fifth Circuit in its opinion, there was direct evidence that Respondent had evidence in its possession regarding the June offset, thus raising the question of waiver of Respondent's May 8, 1979, contractual rights. The trial court determined that reasonable minds could differ

regarding the waiver question and submitted the question to the jury. The jury disregarded the evidence tendered by Respondent (regarding its uncontrolled in-house procedures handled by only a loan processor) and drew the inferences from direct evidence that Respondent had knowledge of the June offsets through its employees, i.e. loan processors, loan supervisors, accountants and auditors.

Based upon the evidence in this record reasonable minds could differ as to whether or not Respondent had knowledge of the June offsets and that the trial court properly submitted the "waiver" issue to the jury. The honorable Court of Appeals for the Fifth Circuit erred in not reviewing *all* the evidence in the light most favorable to this Petitioner, therby applying a standard of review other than that prescribed both by this Court and other previous decisions within the Fifth Circuit.

QUESTION NO. 3 (RESTATED). DID THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR BY REQUIRING THAT A PARTY DETRIMENTALLY RELY ON ANOTHER PARTY'S CONDUCT BEFORE SUCH PARTY'S CONDUCT MAY CONSTITUTE ACTS OF WAIVER TO CERTAIN KNOWN RIGHTS; AND, AS SUCH, DID THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CREATE IMPORTANT FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT?

Petitioner now turns to the detrimental reliance aspect of waiver. The Fifth Circuit held on pages 948 and 949 of its opinion that the trial court erred in not granting a judgment n.o.v. due to the failure of Petitioner to present evidence of detrimental reliance by Petitioner of said waiver. Petitioner submits that the Court of Appeals erred in requiring, as a matter of law, that Respondent's conduct misled Petitioner to its detriment as a prerequisite to the waiver by Respondent of its May 8, 1979, contractual rights.

In Texas, waiver is essentially unilateral in character; it

results as a legal consequence from some act or conduct of the party against whom it operates; *no act of the party in whose favor it is made is necessary to complete it*; and it is not essential that it be based upon estoppel. *Massachusetts Bonding and Insurance Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. Sup. 1967) and *Equitable Life v. Ellis*, 105 Tex. 526, 147 S.W. 1152 (Tex. Sup. 1912). The Texas courts through *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210 (Tex. Civ. App. — Amarillo 1981, writ ref'd n.r.e.) have determined that intention of waiver may be manifested by silence or inaction coupled with knowledge and an unreasonable length of time in which the party may object. Additionally, in *Alford, Meroney & Co. v. Rowe*, supra, the court stated that, notwithstanding express renunciation or silence, waiver may be manifested by conduct which would mislead the opposite party into the honest belief the waiver was intended or assented to.

Petitioner submits that Texas law does not require detrimental reliance by this party as a condition precedent to waiver in situations not involving express renunciation of said waived right and that the Fifth Circuit's reliance on *Miller v. Deahl*, 239 S.W. 679 (Tex. Civ. App. 1922) is not authority upon which the Fifth Circuit may rely since the refusal of writ by the Texas Supreme Court in 1922 constituted approval of the result, *but not of the opinion. Fleming v. Texas Loan Agency*, 87 Tex. 238, 27 S.W. 126 (Tex. Sup. 1894). In Texas, the Supreme Court may review decisions of the lower courts and affirm the result without affirming the opinion and reasoning. When a writ is refused n.r.e. as in *Alford, Meroney & Co. v. Rowe*, supra, this means that the Texas Supreme Court affirmed because it did not find reversible error by the lower court. Consequently, the *Alford, Meroney* case expressly overrules the decision in *Miller*.

Assuming Respondent had knowledge of the June offsets as previouly discussed herein, Petitioner submits there is more than sufficient evidence upon which the jury may

determine that the failure of Respondent to act or object during the period of time after said June offsets constituted intention to waive.

Additionally, once again assuming Respondent had knowledge of the June offsets, Petitioner submits the trial court concluded that the inaction or failure to object by Respondent was conduct of such nature as to mislead Petitioner into an honest belief that the May 28, 1979, revocation was completed and that Petitioner could transact future business with Williamson Companies, Inc., under the belief that payment from Williamson could be received in the form of offsets. Therefore, Petitioner was misled into the honest belief that offsets with Williamson Companies, Inc. could occur; and, even though Petitioner submits that detrimental reliance is not a legal factor under Texas law, it can be reasonably inferred from the evidence in the record that Petitioner would not have entered into the subject transaction with Williamson Companies, Inc. without first having the ability to offset payments.

Consequently, Petitioner submits the honorable Court of Appeals for the Fifth Circuit erred in requiring, as a matter of Texas law, that detrimental reliance be a condition precedent to waiver by Respondent, and Petitioner submits that the honorable Court of Appeals mistook the legal elements of estoppel for the elements of waiver, and thus the Court erred in holding that a judgment n.o.v. should have been granted by the trial court because Petitioner allegedly did not detrimentally rely upon the acts and conduct of Respondent.

CONCLUSION

Based upon the foregoing reason and authority, Petitioner respectfully requests this Petition for Writ of Certiorari be granted.

Respectfully submitted,

TRUE & McLAIN

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State Bar No. 20248000

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PROOF OF MAILING AND SERVICE

I, Jerry T. Steed, one of the attorneys for Ben Kozloff, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify the following:

1. On the Nineth day of May, 1983, I deposited in a United States Post Office located at Dallas, Dallas County, Texas with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing the foregoing Petition for Certiorari; and

2. On the Nineth day of May, 1983, I deposited the foregoing Petition for Certiorari in a United States Post Office with first-class postage prepaid, and properly addressed to the following:

a. Vernon O. Teofan, Esq., Fretag, Marshall, LaForce, Rubinstein, Stutzman & Teofan, 1800 Skyway Tower, 400 North Olive Street, Dallas, Texs 75201; and

b. George F. McElreath, Esq., Ungerman, Hill, Ungerman, Angrist, Dolginoff & Vickers, 10th Floor, United Fidelity Building, 1025 Elm Street, Dallas, Texas 75202.

JERRY T. STEED

SUBSCRIBED AND SWORN TO BEFORE ME at Dallas, Dallas County, Texas this Nineth day of May, 1983.

Notary Public in and for
The State of Texas

My Commission Expires:

11-5-84

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-80-0105-G

WELLS FARGO BUSINESS CREDIT,
Plaintiff,

VS.

BEN KOZLOFF, INC.,
Defendant

JUDGMENT

On the 30th day of April, A.D. 1981, came on regularly for trial the above numbered and entitled cause. Plaintiff, Wells Fargo Business Credit, appeared by representative and its attorneys, Vernon O. Teofan and George F. McElreath. Defendant, Ben Kozloff, Inc., appeared by representative and its attorneys, Roy J. True and Jerry T. Steed. A jury of twelve (12) persons was duly accepted, impaneled and sworn to try the action.

The jury herein having heard the evidence, under oath, and the argument of counsel for their verdict and in response to the following Special Issues, Definitions and explanatory instructions submitted to them by the Court, on the 1st day of May, 1981, by a unanimous vote made the following respective findings:

Question No. 1: DID KOZLOFF PROVE THAT ON OR BEFORE NOVEMBER 6, 1979, GREG WILLIAMSON RECEIVED THE BEN KOZLOFF, INC. LETTER DATED MAY 25, 1979? Answer: KOZLOFF DID PROVE.

Question No. 2: DID KOZLOFF PROVE THAT GREG

WILLIAMSON WAS ACTING AS THE AGENT OF WELLS FARGO WHEN HE RECEIVED THE MAY 25, 1979, LETTER? Answer: KOZLOFF DID PROVE.

Question No. 3: DID KOZLOFF PROVE THAT WELLS FARGO WAIVED ITS RIGHTS IN THE MAY 8, 1979, LETTER? Answer: KOZLOFF DID PROVE.

The above findings of the jury were duly received by the Court, and were filed and entered of record on the minutes of such Court. On the basis thereof, the Court is of the opinion that, on the merits, judgment should be rendered in favor of Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Wells Fargo Business Credit, take nothing of and from Defendant, Ben Kozloff, Inc., by reason of its lawsuit herein.

IT IS FURTHER ORDERED that all costs of Court be taxed against the Plaintiff, Wells Fargo Business Credit, for which let execution issue.

All relief not specifically granted herein is hereby denied. SIGNED THIS 28TH day of May 1981.

JUDGE, United States
District Court,
Dallas Division

WELLS FARGO BUSINESS CREDIT,
Plaintiff-Appellant,

v.

BEN KOZLOFF, INC.,
Defendant-Appellee.

No. 81-1452

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

January 20, 1983.

Before BROWN, RUBIN and REAVEY, Circuit Judges.
JOHN R. BROWN, Circuit Judge:

Wells Fargo business Credit (Wells Fargo), a commercial lending institution, brought suit to recover payment of amounts wrongfully offset in breach of a no-offset agreement with Ben Kozloff, Inc. (Kozloff), for the accounts of Williamson Companies, Inc. (Williamson). Because we find that Greg Williamson was not an agent for Wells Fargo to receive a rescission of the no-offset agreement and that Wells Fargo did not waive the agreement, we reverse.

FISH STORY

Williamson and defendant Kozloff were both frozen seafood broker-wholesalers. Williamson bought seafood from and sold seafood to Kozloff. Ben Kozloff is the president of Kozloff. Greg Williamson is the vice-president and secretary of Williamson.

In May of 1979, Wells Fargo began to finance the business of Williamson against the security of, among other things, Williamson's accounts receivable. Not all of the accounts were considered eligible, however, for the purpose of computing the amount of the cash advance that would be available to Williamson at any given time. Among the accounts considered ineligible were "contra accounts", consisting of those accounts with business concerns to which Williamson not only sold but also purchased seafood. Such

accounts would not be considered eligible accounts against which an advance could be made unless Williamson obtained and submitted to Wells Fargo a no-offset agreement from the contra account.

Greg Williamson telephoned Ben Kozloff and secured his promise to sign such an agreement on behalf of Kozloff and return it to Williamson. The record indicates that this promise was made and fulfilled in a letter dated May 8, 1979, by Ben Kozloff "in a weak moment" as a favor to Greg Williamson. The Kozloff no-offset agreement was delivered to Wells Fargo by Greg Williamson and Wells Fargo thereafter made advances to Williamson against the Kozloff accounts.

Soon thereafter, Kozloff apparently reconsidered its participation in the no-offset agreement. As the result, Kozloff claimed to have sent Greg Williamson a letter dated May 25, 1979 in which it advised Wells Fargo that it would offset accounts receivable arising out of Williamson's indebtedness to Kozloff. The May 25 letter was introduced as evidence at trial.

On or about June 13, 1979, Kozloff tendered a check to Williamson with a typewritten notation on the back indicating that the check was in full payment of certain numbered invoices. Williamson endorsed the check and remitted it in kind to Wells Fargo where it was processed and deposited. The check voucher attached to the June 13, 1979 check shows a credit against the amounts due Williamson in the amount of $114,918.75. This credit was actually an offset of the $114,918.75 due Kozloff from Williamson. Greg Williamson had previously telexed Kozloff to authorize the offset of this amount. Wells Fargo was not aware that Greg Wiliamson had authorized the June offset or that an offset had occurred prior to January of 1980.

No further offsets of account occurred until December 28, 1979, when Kozloff offset the sum of $285,597.40

against an account due Williamson of $315,647.60. The December 28, 1979 checks were handed over directly to an officer of Wells Fargo by Greg Williamson who informed the officer of the offsets. Collateral and collection reports were received by Wells Fargo on January 3, 1980, accompanied by invoices, check vouchers and other checks received that day. Wells Fargo negotiated the Kozloff checks and made demand upon Kozloff for payment of the amount that had been wrongfully offset in breach of the May 8 agreement.

Wells Fargo filed suit to recover amounts wrongfully offset and a jury trial was held. Special issues were submitted to the jury.[1] It found all issues in favor of Kozloff and judgment on the verdict was entered. Well Fargo appeals.

WELLS FARGO'S APPEAL: REAL OR JUST RED HERRINGS?

Wells Fargo serves up four issues on appeal. It argues first that there is no evidence in the record to sustain the jury's finding that the Kozloff letter dated May 25, 1979 (rescinding the no-offset agreement) was received on or before November 6, 1972.[2] Wells Fargo argues second that

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[1] *Question No. 1:* Did Kozloff prove that on or before November 6, 1979, Greg Williamson received the Ben Kozloff, Inc. letter dated May 25, 1979? Answer: Kozloff did prove.

Question No. 2: Did Kozloff prove that Greg Williamson was acting as the agent of Wells Fargo when he received the May 25, 1979, letter? Answer: Kozloff did prove.

Question No. 3: Did Kozloff prove that Wells Fargo waived its rights in the May 8, 1979, letter? Answer: Kozloff did prove.

[2] It is unclear from the record in this case why the November 6, 1979 date was chosen. Defendant's requested special issues did not include a reference to the date and the documentary evidence fails to reveal the source of the reference. One collateral report received on November 6 and recording accounts reported as of that date was introduced as Plaintiff's Exhibit 19. We can find no further explanation for the reference.

Greg Williamson was not an agent of Wells Fargo when he received the Kozloff letter dated May 25, 1979, if he received it at all. Thus, it argues that knowledge of the rescission letter cannot be imputed by Wells Fargo. Third, Wells Fargo contends that Kozloff did not prove that it waived its rights in the May 8, 1979 letter (no-offset agreement). Finally, it argues that the district court abused its discretion by denying its motion for new trial on the grounds that it was deprived of probity by the court's denying Wells Fargo an opportunity on voir dire to develop information concerning the jury foreman's possible criminal involvement in a wholly unrelated event.

A. THE ONE THAT GOT AWAY

[1-3] Wells Fargo raises two points regarding the receipt of a letter dated May 25, 1979 purporting to rescind the no-offset agreement. It asserts error in the district court's failure to grant j.n.o.v. because the evidence was insufficient to support the jury verdict that Greg Williamson received the rescission letter, and second, in its failure to grant a motion for new trial because the verdict was against the great weight and preponderance of the evidence. Though the standards of review for each differ[3], on neither basis do

[3]Review of a district court's denial of a motion for j.n.o.v. is severely limited. The standard for review, like that for granting the motion, requires that the court review all of the evidence in the light most favorable to the opponent of the motion. If the court then finds that the facts and inferences point so strongly and overwhelmingly in favor on one party that reasonable men could not arrive at a contrary verdict, the motion should be granted. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Where there is conflicting evidence, or there is insufficient evidence to make a "one-way" verdict proper, j.n.o.v. should not be awarded. *Powell v. Lititz Mutual Insurance Co.* 419 F.2d 62 (5th Cir. 1969).

Review of motions for new trial are likewise limited and ordinarily the district court's judgment may be overturned only when there is a clear showing of abuse of discretion. *Bunch v. Walter*, 673 F.2d 127, 130-31 (5th Cir. 1982).

we find adequate reason to overturn the district court's decision.

[4] A letter properly addressed, stamped and mailed may be presumed to have been received by the addressee in the due course of the mail. *Southland Life Insurance Co. v. Greenwade*, 159 S.W.2d 854 (Tex. 1942). Thus, the question here becomes whether or not Kozloff mailed the May 25 letter to Willaimson. If such evidence is presented and not rebutted, then it may be presumed that Williamson received the rescission letter.

[5,6] Placing letters in the mail may be proved by circumstantial evidence, including customary mailing practices used in the sender's business. *Cooper v. Hall*, 489 S.W.2d 409 (Tex. Civ. App. 1972). Testimony in the record indicates that Ben Kozloff saw the May 25 rescission letter in the envelope and saw the envelope sealed. Second, Ben Kozloff testified that the procedure used in mailing the May 25 rescission letter to Greg Williamson was the same as that used in sending the May 8, 1979 no-offset agreement. Finally, Ben Kozloff testified that he had never received a return of the May 25 letter indicating that postal authorities were unable to deliver it. Accordingly, we hold that there was sufficient evidence to create a presumption that the May 25 rescission letter was received by Williamson in the due course of the mail. Thus, the burden of producing evidence of non-delivery shifted to Williamson and Wells Fargo.

There is no evidence in the record that would indicate that Williamson did not receive the May 25 letter. On May 31, 1979, six days after the May 25 rescission letter, Williamson authorized Kozloff to offset the Williamson accounts. This testimony, combined with the evidence concerning the offset notations on the voucher and on the back of the check tendered to Williamson on June 13, 1979, at least raised the inference that Williamson received the May 25 letter. On this basis, we hold that there is sufficient evidence to sustain the jury's finding that Williamson in fact received the May 25 rescission letter from Kozloff.

B. BIG FISH, LITTLE FISH

Wells Fargo's, second argument concerns the trial court's determination that Greg Williamson was the agent of Wells Fargo when he received the Kozloff letter of May 25, 1979. From our examination of the record, we hold that under no theory of agency can Greg Williamson be held to be an agent of Wells Fargo.

[7,8] A party may be held responsible for the acts of its purported agent under three agency theories. The first requires that the principal have endowed its agent with actual authority, express or implied, to carry out its wishes. To create an agency relationship based on actual authority, such authority must have been delegated to the agent either by words that expressly or directly authorize him to do a delegable act, or such authority may be implied from the facts and circumstances attending the transaction in question. Implied authority may arise either independent of any express grant of authority, as from some manifestation by the principal that the particular authority in question shall exist in the agent, or it may arise as a necessary or reasonable implication required to effectuate some other authority expressly conferred by the principal. See 2 Tex.Jur.2d Agency § 36; 3 Am.Jur.2d Agency § 86. Measured by these standards, we find that Wells Fargo endowed Greg Williamson with no actual authority as its agent.

[9] Wells Fargo presented evidence that it in no way insisted that Greg Williamson obtain the no-offset agreement from Kozloff or from any other contra account. Wells Fargo made it clear that it would continue to finance the business of Williamson against the security of Williamson's accounts receivable. The no-offset agreements were necessary only if Williamson wanted to increase its cash availability by including contra accounts. This required a no-offset agreement. Wells Fargo's sole requirement was that Williamson use a form acceptable to it if Williamson

chose to obtain and obtain the benefit of a no-offset agreement. There is no evidence in the record available to this court that Wells Fargo had or reserved the right to direct Williamson to obtain such agreement. Indeed, the financing agreement was clear: contra accounts would not qualify; if the borrower wanted contra accounts included, the borrower had to obtain a no-offset agreement in a form acceptable to Wells Fargo. The initiative was on Williamson. If it furnished the no-offset agreement for contra acccounts, the invoices would be eligible. If not, they would not be. Wells Fargo was thus a mere recipient. We, therefore, see no words or manifestation of any grant of authority to Williamson to act on behalf of Wells Fargo in obtaining the no-offset agreement.

This conclusion is supported by Greg Williamson's apparent understanding of his arrangement with Wells Fargo. Greg Williamson testified that he continued to operate his business as he saw fit even after he had entered into the security agreement with Wells Fargo. We hold that Greg Williamson could not have been the agent of Wells Fargo under this theory of agency.

[10-11] The second method by which a third party can become bound by the acts of its agent is that based on apparent authority. Apparent authority arises when the principal, either intentionally or by lack of ordinary care, induces third persons to believe an individual is his agent even though no actual authority, express or implied, has been granted to such individual. *Lloyds Casualty Insurer v. Farrar,* 167 S.W.2d 221 (Tex. Civ. App. 1942). To hold the principal liable under this agency theory, a party must establish that it has been induced to act in good faith upon certain representations made to it by the principal: *Minneapolis-Moline Co. v. Purser,* 361 S.W.2d 239 (Tex. Civ. App. 1962); see also *Chapapas v. Delhi-Taylor Oil Corp.,* 323 S.W.2d 64 (Tex. Civ. App. 1959); *Bluebonnet Oil and Gas Co. v. Panuco Oil Leases, Inc.,* 323 S.W.2d 334 (Tex. Civ. App. 1959). Such representations must point

unmistakably to an agency relation; the doctrine cannot be invoked if the principal's conduct is of such character that it would be unreasonable to conclude that he intended to be bound. *Owens v. Hughes*, 71 S.W. 783 (Tex. Civ. App. 1903); *City National Bank v. Conley*, 228 S.W. 972 (Tex. Civ. App. 1921).

[12] The second, decisive element that must be shown to establish apparent authority is reliance by the party claiming it on the facts and circumstances which give rise to the agent's apparent powers. To hold a principal liable under the doctrine of apparent authority, a party must show that, when dealing with the supposed agent, he has relied on the agent's authority in good faith, in the exercise of reasonable prudence. *Butterworth v. France*, 66 S.W. 2d 369 (Tex. Civ. App. 1933); *Hearn v. Hanlon-Buchanan, Inc.*, 179 S.W.2d 364 (Tex. Civ. App. 1944); *Bankers' Protection Life Insurance Co. v. Addison*, 237 S.W.2d 694 (Tex. Civ. App. 1951).

[13,14] Kozloff alleges that Wells Fargo's express action in requiring Greg Williamson to solicit and obtain on its behalf the no-offset agreement created an agency relationship. Kozloff submits that these actions so clothed Greg Williamson with authority that a reasonably prudent person would have believed that he had authority to receive a subsequent revocation of the no-offset letter. In the preceding discussion, we held that the actions of Wells Fargo in no way constituted a granting of authority to Williamson to act as its agent. Furthermore, Wells Fargo had no communications at all with Kozloff. There is no evidence that Kozloff knew of any actions by Wells Fargo on which it could rely. Therefore, there was and could be no reliance.

The record fully supports this holding. It indicates that Kozloff executed the no-offset agreement as a favor to Greg Williamson. Thus, we find no reliance in the record which would bind Wells Fargo under a theory of apparent

authority. We do so cognizant of the fact that apparent authority is determined by the acts and conduct of the *principal* and *not* by the acts of the alleged agent. *Hearn*, 179 S.W.2d at 368; *Bolin v. Pacific Finance Corp.*, 278 S.W.2d 879 (Tex. Civ. App. 1954).

[15,16] The third theory under which a principal may be bound by the acts of its purported agent is one based on estoppel. A party basing its claim upon the rules of estoppel must show not only reliance, which is required when the claim is based on apparent authority, but also a change of position such that it would be unjust for the speaker to deny the truth of his words. As discussed above, there being no affirmative act on the part of Wells Fargo to induce Kozloff into believing Williamson was its agent, there was no such reliance. Yet even where a purported principal has not affirmatively misled the third party but has merely carelessly failed to take affirmative steps to deny that another was his agent, there would still be no reliance and hence, no liability. In this instance, "the imposition of liability [on such a party] is so extraordinary that it is doubtful whether he should be made liable to a third person who has made a contract with the pretended agent but has not otherwise changed his position." Restatement (Second) of Agency, § 8, Comment d. (1958).

We also find no indication in the record that Kozloff changed its position in reliance upon Wells Fargo's intentionally or carelessly causing it to believe that Greg Williamson was an agent for Wells Fargo or that it failed to take reasonable steps to notify Kozloff of the facts knowing of such belief and that others might change their position

because of it. See Restatement (Second) of Agency § 8B.[4] Even concluding that there was a change of position on Kozloff's part, since we have held that it was not due to Wells Fargo's conduct, we hold that Wells Fargo cannot be bound as a principal under the doctrine of estoppel.

Having failed to find any means by which Wells Fargo could be held liable as a principal under any theory of agency, we hold the jury's finding that Williamson was an agent for Wells Fargo is not supported by the evidence and, therefore, that the district court erred in not granting j.n.o.v. with respect to that issue.

C. DON'T MAKE WAVES

Since it may be theoretically possible, but not likely, that Kozloff could prevail notwithstanding our holding on Greg Williamson's lack of agency (see Issue No. 2, note 1, *supra*), we think it advisable, if not necessary, that we discuss Wells Fargo's third contention that it did not waive its right to the no-offset agreement. Kozloff argued, and the jury apparently believed, that by receiving and processing the June checks and vouchers; Wells Fargo had knowledge that offsets had taken place. By failing to act on this supposed knowledge,

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[4]Section 8B provides for the imposition of liability on:

(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if

(a) he intentionally or carelessly caused such belief, or

(b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.

(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

Though there is some hint in the testimony of Ben Kozloff regarding his telephone conversation with Greg Williamson of May 31 that he (Kozloff) would not have dealt with Williamson had Greg Williamson not allowed the accounts to be offset, this was not based in any way on actions by Wells Fargo. Thus, there could be no estoppel.

Kozloff argued that Wells Fargo waived its rights in the May 8 agreement. If Wells Fargo is correct in its contention that it had no knowledge of the June offsets and therefore, did not, by inaction in the the face of such knowledge, waive its no-offset agreement, then the jury's finding of waiver (Issue No. 3, note 1 *supra*) is supported by insufficient evidence, requiring j.n.o.v. as to that issue. For the reasons stated below, we so hold.

[17] Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming it. *Massachusetts Bonding and Insurance Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967); *Brightwell v. Norris*, 242 S.W.2d 201 (Tex. Civ. App. 1951); *Butler v. Employers Casualty Co.*, 241 S.W.2d 964 (Tex. Civ. App. 1951); See cases cited at 60 Tex. Jur. 2d Waiver § 1, n. 1. There can be no waiver of a right if a person sought to be charged with waiver says or does nothing inconsistent with the intention to rely on that right. *Maryland Casualty Co. v. Palestine Fashions, Inc.*, 402 S.W.2d 883 (Tex. 1966); *Stowers v. Harper*, 376 S.W.2d 34 (Tex. Civ. App. 1964); *Ryan v. Winegardner*, 348 S.W.2d 284 (Tex. Civ. App. 1961); *Ford v. Culbertson*, 308 S.W.2d 855 (Tex. 1958).

It is undisputed in the record that there was no conscious, unequivocal expression by Wells Fargo to waive the May 8 no-offset agreement. Rather, Kozloff asserts that waiver can be inferred from evidence of silence or inaction, coupled with knowledge of a known right for such an unreasonable period of time as to indicate an intention to waive the right. See *Alford, Meroney & Co. v. Rowe*, S.W.2d 210 (Tex. Civ. App. 1981).

[18,19] It should be remembered, however, that a waiver cannot be inferred from silence alone. In the absence of an express renunciation, there must be an act from which an intention to waive may be inferred or from which waiver follows as a legal result. *Equitable Life Assurance Society v. Ellis*, 137 S.W. 184 (Tex. Civ. App. 1910). A waiver will not

be implied or presumed contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct, the opposing party has been misled to his prejudice into the honest belief that such waiver was intended or consented to. *Miller v. Deahl*, 239 S.W. 679 (Tex. Civ. App. 1922). Thus, the two essential inquiries here are (1) whether Wells Fargo knew of the June offsets; and (2) whether by Wells Fargo's conduct, Kozloff was misled to its prejudice that Wells Fargo had intended or consented to the waiver of the May 8th no-offset agreement.

[20] We turn first to the question of Wells Fargo's knowledge of the May 25 letter. Kozloff asserts that subsequent to Greg Williamson's telex authorization on May 31, 1979, it submitted a check and voucher which offset the sum of $113,750. *The voucher and check carried the notation that certain numbered invoices were paid in full and showed the offset.* Greg Williamson endorsed and remitted the check and voucher to Wells Fargo where it was processed. Williamson attached the check to a daily collateral report, on a form of which was supplied by Wells Fargo. On this basis, Kozloff asserts that Wells Fargo was supplied with knowledge of material facts concerning the offset agreement. At first glance, such implied "notification" would seem sufficient to hold Wells Fargo to knowledge of the June offsets. A closer, more careful examination reveals, however, that charging Wells Fargo with knowledge of the offset on the facts here holds it to an extreme standard of care. We refuse to hold Wells Fargo to such a high standard.

Wells Fargo does not deny that it received the check and voucher. It does contend however, that it had no direct knowledge that Kozloff had offset the Williamson account at any time prior to the offset of December 28, 1979 which triggered this lawsuit. It bases this argument on the fact that the check from Kozloff was processed in Wells Fargo's ordinary course of business which does not include procedures to apply payments to specific invoices.

Under its established procedure, when a check is turned over to Wells Fargo by a customer, it is accompanied by a collateral report and a collection report. In this instance, Williamson also included invoices representing sales by it for the period since the last collateral report, and 11 other checks from Williamson account debtors. Such invoices are not required.

The required information is received by a collateral processor whose function it is to compare the amounts on the checks to the amounts shown on the customer's collateral report. The processor is also responsible for inspecting the checks for endorsements and for running an adding machine tape totalling the face amount of the checks received. Once this is done, the total of the receipts is checked against the figure reported by the customer at the bottom of the "Collections—Net Cash" column of the collection report. If those two figures agree, the checks are sent to the accounting department where a deposit slip is prepared and the checks are sent to the bank.

On this basis, Kozloff asserts that the collateral proces sors, the loan supervisors who review the daily reports and make monthly reports of accounts receivable, and the auditors who perform the 90-day audits had knowledge of the offset. Thus, because Wells Fargo made no objection to any offsets until December of 1979, Kozloff argues that Wells Fargo's silence and inaction combined with its knowledge of the June offset, justified the inference that it waived the May 8 no-offset agreement. We cannot agree.

We observe initially that the June offsets recorded were not in a form that would have enabled Wells Fargo to discover them readily. As indicated by the Appellant's Supplemental Statement of Facts at 5, had Williamson properly reported the offsets, it would have been overline on its loan to Wells Fargo by at least $72,952.62. This would have alerted Wells Fargo to the offset. Second, the actual form in which the offsets were recorded was not one which

would have alerted Wells Fargo to the offsets. As discussed above, the vouchers were not required for processing by Wells Fargo. Consequently, Williamson and Kozloff had no reason to anticipate that Wells Fargo would examine the vouchers for offsets. Moreover, the offsets are listed as "deductions" and, as such, even if examined, would not reveal that they were offsets. Finally, the typewritten notation on the check was also not an item that either Williamson or Kozloff should have anticipated would be noted by the Wells Fargo processor.

To charge Wells Fargo with knowledge under these circumstances then, would be to hold it to an extreme and unreasonable standard of care. To require an organization such as Wells Fargo, a large lending institution which processes thousands upon thousands of checks each day, to examine each check, to compare each voucher against each check, and each of these against each invoice in a search for possible offsets or other violations of its financing arrangements, is to place an unreasonable burden on it. Thus, we hold that there was insufficient evidence that Wells Fargo had knolwedge of the June offsets to support the jury's verdict that it waived its rights in the May 8 letter.

This determination necessarily disposes of our second inquiry here. By holding that Wells Fargo's accounting procedures did not give rise to the inference that it knew of the June offset and, therefore, intended to waive the no-offset agreement by continuing its financing arrangements with Williamson, we hold that Kozloff could not have been misled to its detriment that Wells Fargo intended or consented to the waiver. This determination, combined with our previous holding that Kozloff did not change its position in response to any act by Wells Fargo, leads us to the conclusion that there is insufficient evidence of waiver, either express or implied, to support the jury's verdict that Wells Fargo waived its rights in the May 8, 1979 letter and, for that reason, the district court erred in not granting j.n.o.v. as to this issue.

With j.n.o.v. directed as to both agency and waiver, no basis remains in the jury verdict to sustain the judgment for Kozloff so it must fall.

D. SOMETHING FISHY

As its final basis for appeal, Wells Fargo argues that the District Court abused its discretion by failing to grant a new trial on grounds that undesirable and pernicious elements were introduced to the jury. Having reversed the district court and rendred judgment for Wells Fargo, we need not pass upon the merits of its motion for a new trial on grounds of juror disqualification.

E. GONE FISHIN'

For the foregoing reasons, we reverse judgment below and render judgment in favor of Wells Fargo.

REVERSED AND RENDERED

ALVIN B. RUBIN, Circuit Judge, concurring in the result and in parts of the opinion:

Assumption must be piled upon assumption beyond the height of Pelion on Ossa to justify the conclusion, reached in Part A of the majority opinion, that the Kozloff letter was received by Williamson. No one testified that the letter was mailed. Indeed, there was no testimony that it was even stamped. There was testimony that the letter was written and sealed in an envelope in the same manner as a prior letter. However, this evidence was insufficient to support the inference that someone else stamped and mailed the envelope. There was no admissible evidence of a business routine or custom that would get the letter from Kozloff's desk into the mail. In sum, there was no evidence supporting the conclusion that Williamson received the letter.

Therefore, I would not create precedent for other cases by concluding that there was indeed, sufficient evidence to support a jury finding, or to create a presumption under Texas law, that the letter was received. See Fed.R.Evid.

302. Nor is there any need to discuss the question. As the majority opinion explains, Williamson was not Wells Fargo's agent and Wells Fargo did not waive its rights under the no-offset agreement. So it makes no difference whether or not Kozloff's letter was received.

Accordingly, I concur in the judgment and in the reasons for it advanced in Parts B and C of the opinion. I am dubitante about Part A and, therefore, do not join in it.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1452

D.C. Docket No. Ca-3-80-0105-G

WELLS FARGO BUSINESS CREDIT,
Plaintiff-Appellant,
versus

BEN KOZLOFF, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before BROWN, RUBIN AND REALVEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERAITON WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered.

IT IS FURTHER ORDERED that the Defendant-Appellee pay to the Plaintiff-Appellant the costs on appeal, to be taxed by the Clerk of this Court.

January 20, 1983

RUBIN, Circuit Judge, concurring in result and in parts of opinion.

ISSUED AS MANDATE: April 20, 1983

EXHIBIT "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1452

WELLS FARGO BUSINESS CREDIT,
Plaintiff-Appellant,
versus
BEN KOZLOFF, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion January 20, 1983, 5 Cir., 198__, _____ F. 2d ___). (FEBRUARY 18, 1983)

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of

EXHIBIT "D"

it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

NO. 82-1867

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

BEN KOZLOFF, INC.,

Petitioner,

V.

WELLS FARGO BUSINESS CREDIT,

Respondent.

On Petition for
Writ of Certiorari
To the United States Court of
Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ATTORNEYS FOR RESPONDENT

NO. 82-1867

IN THE
SUPREME COURT
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OCTOBER TERM, 1982

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DESIGNATION OF CORPORATE RELATIONSHIPS

Wells Fargo Business Credit, as Respondent, files this Brief in Opposition to the Petition for Certiorari and states that:

This is the original designation of corporate relationships. Wells Fargo and Company, a California corporation, is the parent company of Wells Fargo Business Credit. Wells Fargo and Company's principal subsidiary is Wells Fargo Bank N.A. Subsidiaries of Wells Fargo Bank are Wells Fargo Asia Limited, Wells Fargo Bank Canada, Wells Fargo Bank International, Wells Fargo Corporate Services, Inc., and Wells Fargo Latin American Bank Cayman Islands Limited. Major affiliates of Wells Fargo Bank are Dubai Bank Limited, Ecuatoriana de Financiamientos, S.A., Empresa Financieras Continental, S.A. and Shanghai Commercial Bank Limited. Commercial nonbank subsidiaries of Wells Fargo are Wells Fargo AG

Credit, Wells Fargo Business Credit, Wells Fargo Capital Markets, Inc., Wells Fargo Equity Corporation, Wells Fargo Credit Corporation, Wells Fargo Insurance Services, Central Western Insurance Company, Wells Fargo Leasing Corporation and Wells Fargo Securities Clearance Corporation. Wells Fargo real estate nonbank subsidiaries are Wells Fargo Mortgage Company and Wells Fargo Realty Advisors.

DATED: June 9, 1983.

SUMMARY OF OPPOSITION

1. The decision by the Fifth Circuit does not conflict with the decisions of other circuits in general and the Second Circuit in particular with regard to the applicable standards for imputing knowledge and notice of corporate employees to the corporate principal. To the extent that the cases have parallels in their facts, the courts apply the same rules. However, as to the essential facts involved in Corporacion de Mercado Agricola v. Mellon Bank International, 608 F.2d 43 (2d Cir. 1979) and the present case, the cases are dissimilar and call for the application of different rules. As the cases do not deal with the same issues, there is no conflict in holdings between circuits and no basis for review by Writ of Certiorari.

2. The Fifth Circuit followed well established principles for reviewing the

denial of a motion for judgment notwithstanding the verdict. Petitioner has not contested other parts of the Appellate Court's decision which applied the same standard of review and resulted in findings in part favorable to Petitioner and in part unfavorable. This consistent application of well established standards of review does not depart in any way from the accepted and usual course of judicial proceedings and, therefore, it is not necessary that this Court invoke its power of supervision.

3. The present case is maintained in the Federal Court by virtue of the Court's concurrent jurisdiction over cases involving citizens with diverse citizenship. As such, the Federal Court is bound to construe and apply state substantive law in the resolution of the case. Therefore, the Court's holding that detrimental reliance

is an element of waiver is a proper construction and application of Texas law rather than the creation of important federal law. As this case does not involve the creation or application of federal law, there is no need for this Court to review the decision of the Fifth Circuit by Writ of Certiorari.

STATEMENT OF FACTS

Wells Fargo Business Credit ("Wells Fargo") is a commercial lending institution (R.257). The Williamson Companies, Inc. ("Williamson") and Ben Kozloff, Inc. ("Kozloff") are frozen seafood brokers and wholesalers (R.257). Greg Williamson is vice president of Williamson (TR.179). Ben Kozloff is the president of Kozloff (TR.226). Williamson bought seafood from and sold seafood to Kozloff (R.257). In May of 1979, Wells Fargo began to finance the business of Williamson. Wells Fargo took a

security interest in all of Williamson's accounts receivable as well as other assets (R.258). While all of the accounts receivable were covered by the security interest, not all accounts receivable were taken into consideration in computing the amount of cash available for advancement to Williamson at any given time (TR.84-87; Def.Ex.12). "Contra" accounts (those persons and entities to whom Williamson sold to as well as purchased from) were not considered eligible in computing the amount of cash advance available. At its option, Williamson could make "contra" accounts available for the cash advance computation by obtaining from the "contra" account and submitting to Wells Fargo, an agreement with the "contra" account, that amounts which Williamson owed the contra account would not be offset against amounts which the contra account owed Williamson. Such an agreement ("no

offset") would entitle Williamson to a larger cash advance from Wells Fargo (TR.92-93,138). Wells Fargo gave Greg Williamson a form which Wells Fargo would consider acceptable if Williamson decided that it wanted to seek a no-offset agreement from a contra account (TR.139). On behalf of Williamson, Greg Williamson attempted to get a no-offset agreement with Kozloff so that the Kozloff account would be used by Wells Fargo in computing the amount of cash advance available to Williamson. Greg Williamson obtained an agreement from Kozloff not to offset accounts (TR.248, app.p.1).[1] Kozloff made this agreement as a favor to Greg Williamson (TR.248) and with the understanding that by signing it Williamson would be able

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[1]The appendix has been lodged with the Clerk of this Court.

to pay Kozloff quicker (TR.249-250). Thereafter, Williamson delivered the Kozloff agreement (Pltf. Ex.1) to Wells Fargo (TR.185). Upon receipt of the Kozloff no-offset agreement, Wells Fargo included the Kozloff account in calculating the amount of cash advance available to Williamson (TR. 100).

On or about June 13, 1979, Kozloff tendered a check (TR. 234) to Williamson which had a typed notation on the back that it was in full payment of certain invoices (App.pp.2,3). Williamson endorsed the check and sent it to Wells Fargo where it was processed by a clerk and deposited (TR. 173,175). Attached to that June 13 check was a sheet ("voucher") which showed a "deduction" to Kozloff in the sum of $114,918.75 (TR.128-131; Def.Ex.8,9, App.p.4). The "credit" was actually an offset by Kozloff of money due it from Williamson.

Unknown to Wells Fargo, Greg Williamson had previously sent a telex to Kozloff authorizing the offset (TR.193; Def.Ex.3) (TR.169,196,213). Williamson did not alert Wells Fargo to the fact that Greg Williamson had negotiated an offset or that the voucher attached to the June 13th Kozloff check was based upon an offset by Kozloff rather than a credit (TR.168,207; Def.Ex.19). Therefore, Wells Fargo was unaware that the June offset had occurred. In the ordinary course of business, Wells Fargo does not apply payments to specific invoices (TR. 136). When sent to Wells Fargo, the checks are accompanied by a collateral report and a report of collections prepared by Williamson (App. pp.5,6). The documents are reviewed by a collateral processor who merely adds the totals shown on the invoices and then compares that to the amount on line 2 of the collateral report, to see that they are the same. The clerk then looks at the checks

for endorsement and totals the face amount of the checks. That number is compared to the "Collections - Net Cash" column on the collateral report. As the invoices are used only for as examination of the total outstanding accounts receivable, there is no need for a procedure whereby individual invoices are pulled and matched against checks (TR.78 ,130,133,166). The collateral report submitted by Williamson showed sales of $264,575.18 (on line 2). Invoices 7304 - 7354 and 8900 - 8906 were attached to substantiate the amount of sales reported.

Kozloff did not attempt to offset the Williamson account again until December 28, 1979. At that time, Kozloff offset $285,597.40 against $315,647.50 it owed Williamson (TR.218, R. 258, App.pp.7-10). This offset was brought to the attention of Wells Fargo by Greg Williamson (TR.219, 220). The December 28, 1979 checks were handed directly to an officer of Wells Fargo by

Greg Williamson (TR.220). The collateral and collection reports were received by Wells Fargo on January 3, 1980, accompanied by invoices, vouchers and other checks. Wells Fargo subsequently made demand on Kozloff for payment of the amount of offset (R.258). Prior to that time, no one from Wells Fargo ever communicated directly with Kozloff (TR.281).

ARGUMENT

1.

The Decision of the Fifth Circuit is Consistent with the Decisions of Other Circuits with Regard to the Applicable Standards for Imputing Knowledge and Notice of Corporate Employees to the Corporate Principal.

The decision of the Fifth Circuit (App. pp.11-20) does not conflict with the law in any other circuit with regard to the applicable standards for imputing knowledge to a

corporation. In particular, to the extent that the decision in this case and the decision in Corporacion de Mercado Agricola v. Mellon Bank International, 608 F.2d 43 (2d Cir. 1979) ("Mellon") involve similar facts, they apply the same rule. It is important to note, however, that the cases essentially involve different fact situations. In Mellon, the claim was made that the corporation did not know of a revocation of a letter of credit because the notice of revocation was sent to the corporation's mailroom rather than its legal department. The Second Circuit rejected this contention and found that the corporation had received the notice. The present case does not involve such a situation. The issue here is whether the information given to Wells Fargo was sufficient to constitute a notice of offset. In Mellon, there was no issue concerning the nature of the documentation sent to the corporation

-- it was on its face a notice of revocation of the letter of credit. In the present case, the documents supplied to Wells Fargo did not on their face effect a notice of offset. Therefore, while the Fifth Circuit did impute to Wells Fargo the knowledge which its employees had from the documents, it found that there was insufficient evidence to conclude that those documents imparted notice of an offset. The contention of Petitioner that the documentation showed an offset is a mischaracterization of the evidence and the Appellate Court's opinion. At no time did Petitioner submit any documentation to either Williamson or Wells Fargo which showed an offset. The Appeals Court went into an extensive review of the documentation which Kozloff and Williamson submitted to Respondent. 695 F.2d at 948. The Court found that the documentation was not in a form that revealed, suggested or implied an offset. The Kozloff "offset"

check listed the amounts offset merely as "deductions." The fact that there were deductions does not lobically lead to the conclusion that there had been an offset. Legitimate deductions could be taken for a number of reasons: a return of merchandise, merchandise invoiced but not delivered, or merchandise discounts. Further, Williamson's books reported the $5,702.25 receipt from Kozloff as a "short" payment rather than full payment on the $120,621.00 receivable. It is for that reason that neither Wells Fargo's month end reconciliation nor the December, 1979, audit revealed the fact that an offset rather than some other type of legitimate deduction had occurred (TR. 161,171,173, 207). Had the offset been reported properly by Williamson in the collection report to Wells Fargo, the June 20, 1979 report at line 3 column 5 would have

contained the figure $120,621.00 rather than $5,702.25 (TR.169).[2]

Given these facts the Fifth Circuit held that to conclude that knowledge of these facts constituted knowledge of an offset placed an unfair burden on Wells Fargo. The Court did not hold that corporate employees had knowledge of an offset. Rather, the Court found that the knowledge which the employees had and which was imputed to the corporate principal was insufficient to logically lead to the conclusion that there had been an offset. Such a holding is not in conflict with Mellon. As there is no conflict of circuits, this Court need not review the decision of the Fifth Circuit by Writ of Certiorari.

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[2]Wells Fargo is not held responsible for any information which Williamson has as there was no agency relationship between the two. 695 F.2d at 944 - 946.

2.

The Fifth Circuit Applied the Proper Standard and Followed Proper Procedure in Reviewing the Trial Court's Denial of Wells Fargo's Motion for Judgment Notwithstanding the Verdict.

In reviewing the Trial Court's denial of Wells Fargo's Motion for Judgment notwithstanding the verdict the Fifth Circuit stated:

> Review of a district court's denial of a motion for j.n.o.v. is severely limited. The standard for review, like that for granting the motion, requires that the court review all of the evidence in the light most favorable to the opponent of the motion. If the Court then finds that the facts and references point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the motion should be granted. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). Where there is conflicting evidence, or there is insufficient evidence to make a "one-way" verdict proper, j.n.o.v. should not be awarded. Powell v. Lititz Mutual Insurance Co., 419 F.2d 62 (5th Cir. 1969).

695 F.2d at 944 n.3. Petitioner does not dispute that this is the correct standard (See, Petition for Writ of Certiorari p. 12). In reaching the conclusion that the Fifth Circuit deviated from this standard, Petitioner misstates the reasoning and holding of the Court. The Court did not find that the evidence established that Wells Fargo had information sufficient to give it notice of the June offset by Kozloff. Indeed, the Court found that the evidence showed that the information in the possession of Wells Fargo did not give notice of the offset. The Court found that at best the evidence showed that deductions had occurred, but that such deductions did not support the inference that an offset had occurred. 695 F.2d at 948, 949. The Court did not weigh the evidence. It properly considered all the evidence and concluded

that the evidence was insufficient to support a finding that the documents given to Wells Fargo gave notice of the June offset. That the jury concluded that the check and voucher were sufficient notice of offset, as Petitioner suggests, is no argument at all.[3] The very existence of the motion for judgment notwithstanding the verdict and the authority of an Appellate Court to review the denial of the motion denies the suggestion that implied findings of a jury are conclusive. The Court is allowed to look at the evidence to determine if it could reasonably support a finding reached by a jury. The evidence in this case is clear that the documentation did not give notice of an offset either directly or by inference. The Fifth Circuit properly

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[3]See, Petition for Writ of Certiorari p. 14. In fact, the jury did not make any such finding. The jury only found that Wells Fargo had waived its rights. 695 F.2d at 943 n.2.

reviewed all the evidence and found that the motion for judgment notwithstanding the verdict should have been granted.[4] The Fifth Circuit has not deviated from the accepted procedures and standards for reviewing a trial Court's denial of a motion for judgment notwithstanding the verdict and thus there is no need for the Court to exercise its power of supervision by issuing a Writ of Certiorari.

3.

The Fifth Circuit Properly Construed and Applied Texas Law In Requiring

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[4]It is interesting to note that in its decision, the Fifth Circuit considered several issues concerning whether j.n.o.v. should have been granted. In one instance, the Court found that j.n.o.v. should have been denied. In another, unrelated to the waiver issue, the Court found that j.n.o.v. should have been granted. Petitioner does not question the review by the Court in these instances even though the Court applied the same standard of review for denial of j.n.o.v. and made evaluations of evidence upon which it relied in consideration of the waiver issue. Petitioner has failed to demonstrate how the Court's approach on waiver differed from the other unquestioned parts of its review.

Detrimental Reliance as an Element of Waiver and did not Create Federal Law.

The present case is in the Federal Court by virtue of its concurrent jurisdiction jurisdiction over cases involving parties with diverse citizenship, 28 U.S.C. 1332. As such the Federal Court is bound to apply Texas substantive law to resolve non-procedural issues. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The Fifth Circuit construed and applied Texas law in reaching the conclusion that Kozloff had not been misled to its detriment that Wells Fargo intended or consented to the waiver. 695 F.2d at 948, 949. This interpretation of Texas law is correct. Petitioner seeks to dismiss the authority upon which the Court relied for the requirement of detrimental reliance as having been overruled by a subsequent Texas decision. Petitioner incorrectly states Texas law. Petitioner

states that because of the disposition by the Texas Supreme Court of the case upon which the Fifth Circuit relied and the decision in Alford, Meroney & Co. v. Rowe, 619 S.W.2d 210 (Tex.Civ.App. - Amarillo, 1981, writ ref'd n.r.e.), the decision upon which the Fifth Circuit relied had been expressly overruled. Petitioner is wrong. The Fifth Circuit relied on the decision in Miller v. Deahl, 239 S.W. 679 (Tex.Civ.App. - Amarillo, 1922, writ ref'd) for the proposition that before a party can claim waiver it must detrimentally rely on the actions or silence of the party sought to be charged with the waiver. 695 F.2d at 947. The notation "writ refused" in the citation indicates that the Supreme Court approved the result reached but did not necessarily approve the opinion. Brackenridge v. Cobb, 85 Tex. 448, 21 S.W. 1034 (1893), Fleming v. Texas Loan Agency, 87

Tex. 238, 27 S.W.126 (1894). The notation "writ ref'd n.r.e." as in the Alford decision, supra, means that the Supreme Court is not satisfied that the opinion of the Appellate Court in all respects has correctly declared the law, but is of the opinion that the application for a writ of error presents no error which requires reversal. Tex.R.Civ.P. 483. See, Wilson, Hints on Precedential Evaluation, 24 Tex. B.J. 1037 (1961) (giving eight explanations for the writ ref'd n.r.e. designation). Therefore, the writ histories of the two aforementioned cases do not support Petitioner's assertion that the Alford decision expressly overrules the decision in Miller v. Deahl. In addition, Alford does not contain any language whereby it expressly overrules Miller. Indeed, the Miller decision is not even mentioned. Finally, the decision in Alford relies on detrimental reliance by the party seeking to impose the waiver:

> The jury could also conclude, from Rowe's evidence that his withdrawal was dependent on waiver of the paragraph 12(c) provision and that the December 6, 1977 memorandum by the partnership announcing Rowe's withdrawal, at a time when Rowe had not received an express reply to his proposal, was conduct of such a nature as to mislead Rowe into an honest belief that the terms of his proposed withdrawal, including waiver of the paragraph 12(c) provision, was assented to.

619 S.W.2d 210, 215.

Notwithstanding the above analysis, the Amarillo branch of the Texas Court of Appeals, the same court upon which Peitioner relies for the proposition that detrimental reliance is not an element of waiver, has held that one of the elements of waiver is reliance by the party claiming waiver. Cox v. Bancoklahoma Agri-Service Corp., 641 S.W.2d 400, 404 (Tex.Ct.App. - Amarillo, 1982, no writ). Therefore, the Fifth Circuit was correct in its interpretation and application of Texas law on the issue of detrimental reliance.

Having determined that Texas law requires that a party detrimentally rely on the conduct of the party sought to be charged with the waiver the Court reviewed the evidence to determine if Petitioner had established all the requisite elements of waiver. There was no evidence that Kozloff had relied on the conduct of Wells Fargo. 695 F2d at 946, 948.

It must be noted that even if the Fifth Circuit erroneously interpreted Texas law on the issue of detrimental reliance this Court would still not need to review the decision. As the case is premised on diversity of citizenship, it is not creating any new federal law. Where a circuit court is construing state law, the review of this Court is unnecessary.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FREYTAG, MARSHALL,
LAFORCE, RUBINSTEIN,
STUTZMAN & TEOFAN

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CERTIFICATE OF SERVICE

This is to certify that on the 9th day of June, 1983, I mailed 40 copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Clerk of the United States Supreme Court and 3 copies to Roy J. True and Jerry T. Sneed, True & McCain, 1100 Glen Lakes Tower, 9400 North Central Expressway, Dallas, Texas 75231, by First Class Mail, postage prepaid.

Vernon O. Teofan
Vernon O. Teofan